Supreme Court, U.S.
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No. 08-804

In The
Supreme Court of the United States

LOU ANNE LAVENDER PERKINS,
Petitioner,

v.

DCC LITIGATION FACILITY, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Sixth Circuit erred by affirming the entry of judgment denying Perkins's motion to opt out of the Settlement Facility-Dow Corning Trust after the opt-out deadline had elapsed.

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OPINIONS BELOW

The opinion of the Sixth Circuit affirming the district court's judgment (Pet. App. _____) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is case involving a class-action regarding silicone gel breast implants. Under the Amended Joint Plan of Reorganization for Dow Corning Corporation, claimants had the option to settle or to elect to opt out of the settlement under the Settlement Facility and proceed with litigation against the Litigation Facility. Claimants electing to pursue litigation instead of participating in the settlement program "must make their election by completing, signing and returning the Participation Form to the Claims Office on or before the six (6)-month anniversary of the Effective Date ("Election Deadline")." (Settlement Fund and Distribution Agreement, Annex A. Art.3.02(c)(v)). The Election Deadline was November 29, 2004.

On September 10, 2003, Perkins updated her information to include her name, address and diagnosis and requested assistance and information from the Dow Corning Tort Committee, a government appointed committee serving as a go-between the Settlement Facility an the claimants', via email to: info@tortcomm.org. Perkins was not informed that the Dow Corning Settlement Facility did not have her correct address until after the

November 29, 2004 deadline to opt-out. Because she never received a Participation Form for the opt-out, Perkins did not submit a Participation Form to the Claims Office on or before November 29, 2004.

On February 4, 2005, Perkins was referred to the Dow Corning Settlement Facility and told that it was in total disarray, was 50,000 claims behind, had not paid claims in two years, and its current administrator was being forced to step down. The Settlement Facility (1) could not find her records; (2) could not tell her if she had opted-in or opted-out; and (3) could not tell her when she registered or what her SID's# or Lot#'s were. Perkins was referred to the MDL Facility, a representative of whom confirmed that Settlement Facility was in total disarray.

After multiple calls to the Settlement Facility, Perkins discovered that her records had never been updated and the Settlement Facility had an incorrect address in her file where the opt-out information had been sent and returned undelivered. She was advised by the Settlement Facility that she should write a letter of Appeal to Judge Hood, U.S. District Court in Detroit, MI, on or before February 28, 2005, and she would be allowed to opt-out after the November 2004 deadline. On February 18, 2005, Perkins sent a letter to the District Court, with an explanation and statement of facts.

The new administrator for the Settlement facility, who was appointed two years after Perkins originally updated her information via email, contended that Perkins's opt-out information was

sent to her last known address and that of her attorney. However, the administrator failed to mention that the Settlement Facility was in total disarray at that time and that her records had never been updated when the opt-out information was sent.

Procedural History

Perkins, a member of a class of breast implant claimants, moved to opt out of the Settlement Facility-Dow Corning Trust after the opt-out deadline had elapsed. In her motion, Perkins contended that she notified the Settlement Facility of her address by sending an email regarding her address prior to the November deadline as advised by Al Hawkins, Attorney with Alexander Haas Law Firm in San Francisco, referred there by Nancy Leonard, FDA. Her file was never updated due to the total disarray of the Settlement Facility. The email was sent to The Tort Claimants' Committee whose name was changed to the Claimants' Advisory Committee (CAC) when Dow Corning was allowed to reorganize. It was suggested that Perkins sent her email to the wrong email address, but this same email address still resides on the CAC's website today.

The district court denied Perkins' motion. It held that the plain and ordinary meaning of the word "must" as set forth in the Plan is that claimants are required to affirmatively elect to litigate and to complete and return the participation form by the election deadline, and that the requirement is mandatory and not discretionary. The Court further found that the failure of Perkins and her attorneys to provide the Settlement Facility

with her current address did not constitute excusable neglect.

Perkins called the CAC after receiving the U.S. District Court decision and asked how they would have handled the email they received in September 2003, addressed to the Dow Corning Settlement Facility, and they said they were a court appointed go-between for the claimants and the Settlement Facility and that they would have forwarded it on the Settlement Facility and asked them to review it and look into the matter.

Proceedings on Appeal

The Sixth Circuit affirmed, stating: "We agree with the District Court and adopt its well-reasoned opinion and order."

REASONS FOR GRANTING THE WRIT

This case presents an issue of far-reaching impact on class action cases in which class members do not receive the required forms and documentation prior to the deadline to opt in or out of a class and that it was totally beyond Perkins knowledge that the Settlement Facility was in total disarray when her information was updated. Perkins was also held accountable for her attorney's failure to update her address, even though it had already been update by Perkins.

I. THE SIXTH CIRCUIT'S JUDGMENT IGNORES THE FACT THAT PERKINS AFFIRMATIVELY ELLECTED TO LITIGATE OUTSIDE THE CLASS.

The Sixth Circuit erred by ignoring Perkins' clear manifestations of her intent to litigate her claims outside the class. While she does not dispute that she did not follow the strict procedures designated by the Amended Joint Plan of Reorganization and the accompanying plan documents, the district court and the Sixth Circuit should have made a fair and equitable substantive decision, rather than find some procedural default. Here, there can be no doubt that Perkins' conduct—including registering her claim with the Dow Corning Corporation, updating her name, address and diagnosis one year prior to the deadline, and consulting counsel regarding her right to opt out—clearly demonstrated that she affirmatively elected to litigate her claims outside the class.

II. THE SIXTH CIRCUIT'S JUDGMENT IGNORES THE EXCUSABLE NEGLECT RESULTING IN PERKINS' FAILURE TO TIMELY OPT OUT.

Moreover, the Sixth Circuit erred by affirming the district court's determination that Perkins' failure to timely opt out was not the result of excusable neglect.

Under the circumstances of this action, in which claimants have been categorized differently under the "Litigation Facility Agreement" and in which the so-called "opt-out" deadline has undergone a number of revisions and changes, the district court's and Sixth Circuit's draconian application of the November 29, 2004 deadline is an unduly harsh sanction for a claimant who had properly registered

under earlier procedures and had attempted to follow the various methods for opting-out. The district court's and Sixth Circuit's unreasonable denial of Perkins's right to opt out of the class constitutes a denial of procedural due process and is contrary to fundamental notions of fairness. *See Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

LOU ANNE LAVENDER PERKINS,
Petitioner,

v.

DCC LITIGATION FACILITY, INCORPORATED,
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APPENDIX

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United States Court of Appeals, Sixth Circuit.

In re: DOW CORNING CORPORATION,
Reorganized Debtor,

Lou Anne Lavender **Perkins**, Plaintiff-Appellant
v.
DCC Litigation Facility, Inc., Defendant-Appellee.

No. 07-1585.

July 18, 2008.

On Appeal from the United States District Court for the Eastern District of Michigan.

314 BEFORE: MOORE and MCKEAGUE, Circuit Judges; SCHWARZER, FN District Judge.

FN* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

OPINION

WILLIAM W. SCHWARZER, District Judge.

1 **Lou Anne Lavender **Perkins**, a member of a class of breast implant claimants, moved to opt out of the Settlement Facility-Dow Corning Trust after the opt-out deadline had elapsed. Under the Amended Joint Plan of Reorganization for Dow Corning Corporation, claimants had the option to settle or to elect to opt out of the settlement under

the Settlement Facility and proceed with litigation against the Litigation Facility. Claimants electing to pursue litigation instead of participating in the settlement program "must make their election by completing, signing and returning the Participation Form to the Claims Office on or before the six (6)-month anniversary of the Effective Date ("Election Deadline")." (Settlement Fund and Distribution Agreement, Annex A. Art.3.02(c)(v)). The Election Deadline was November 29, 2004.

Perkins did not submit a participation form. In her motion, she argued that she never received a form. However, a claim form packet was mailed to **Perkins'** attorney at his last known address and when it was returned as undeliverable, another packet was sent to **Perkins** at her last known address, which again was returned as undeliverable. **Perkins** claims that she notified the Settlement Facility of her address, but the only communication from her prior to the November deadline was an e-mail addressed to the Tort Claimants' Committee. Not until February 2005 did she contact the Settlement Facility to give her new address. In September 2005, she notified the Settlement Facility of another new address but she never filed a claim form.

The District Court had jurisdiction under the Plan of Reorganization to resolve controversies regarding the interpretation and implementation of the Plan. The Court denied **Perkins'** motion. It held that the plain and ordinary meaning of the word "must" as set forth in the Plan is that claimants are required to affirmatively elect to litigate and to complete and

return the participation form by the election deadline, and that the requirement is mandatory and not discretionary. The Court further found that the failure of **Perkins** and her attorneys to provide the Settlement Facility with her current address did not constitute excusable neglect. We agree with the District Court and adopt its well-reasoned opinion and order.

For the reasons stated, we **AFFIRM** the judgment of the district court.

C.A.6 (Mich.),2008.
In re Dow Corning Corp.
284 Fed.Appx. 313, 2008 WL 2796082 (C.A.6 (Mich.))

END OF DOCUMENT

United States District Court
Eastern District of Michigan
Southern Division

In re: DOW CORNING CORPORATION,
Reorganized Debtor,

Lou Anne Lavender Perkins,
v.
DCC Litigation Facility, Inc.

Civil Action No. 06-CV-12558-DT
Honorable Denise Page Hood

ORDER DENYING MOTION FOR RECONSIDERATION

On March 31, 2007, the Court filed (entered on April 2, 2007) a Memorandum Opinion and Order denying Lou Anne Lavender Perkins' Motion/Appeal to File Notice of Intent. Ms Perkins filed a Motion to Exend Time to Respond to the Order on April 30, 2007, a Motion for Reconsideration on May 1, 2007 and a Notice of Appeal on May 1, 2007

The Local Rules of the Eastern District of Michigan provide that any motion for reconsideration shall be served not later than ten (10) days after entry of such order. E.D. Mich. LR 7.1(g)(1). No Response to the motion andno oral argument thereon shall be allowed unless the Court, after filing of the motion, otherwise directs. E.D. Mich. LR 7.1(g)(2). The

Local Rule states:

> (3) Grounds. Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

E.D. Mich. LR 7.1(g)(3)

Although Ms. Perkins filed her Motion for Reconsideration beyond the ten days after the entry of the Memorandum Opinion and Order, Ms. Perkins filed the requests and Motion for Reconsideration within ten days after the service of the Memorandum Opinion and Order. (Docket No. 10, 4/19/07, Certificate of Service)

Ms. Perkins' letter-motion essentially reiterates her arguments raised in her previous letters to the Court. Ms. Perkins claims that she was represented by Paul Boudreau and Karen Read. The Court addressed these issues in its March 31, 2007 Memorandum Opinion and Order. The Court finds that Ms. Perkins' requests/letter motions merely present the same issues ruled upon by the Court, either expressly or by reasonable implication. The Court further finds that Ms. Perkins has not demonstrated a palpable defect by which the Court

and the parties have been misled nor has she shown that a different disposition of the case would result from a correction of any error.

Accordingly,

IT IS ORDERED that Ms. Perkins Motion to Extend Time (Docket No. 11, filed April 30, 2007) is GRANTED.

IT IS FURTHER ORDERED that the Motions for Reconsideration (Docket Nos. 12 and 15, filed May 1, 2007 and May 3, 2007, respectively) are DENIED.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: February 28, 2008

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on this date, February 28, 2008, by electronic means and/or first class U.S. mail.

S/Sakne Srour
Deputy Clerk

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LOU ANNE LAVENDER PERKINS,

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DCC LITIGATION FACILITY, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons as identified by Sup. Ct. R. 10(a) to grant the Petition, given the Sixth Circuit's analysis of the evidence and opinion affirming the District Court's exercise of proper discretion in denying Petitioner's motion to opt-out of the Settlement Facility in reference to her breast implant claim where the District Court found that Petitioner showed no excusable neglect in failing to opt-out by the deadline date of November 29, 2004, and where Petitioner acknowledged in the Sixth Circuit her "misguided actions" in regard to her failure to opt-out primarily involving claimed reliance on her attorneys?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, DCC Litigation Facility, Inc. is a wholly owned subsidiary of the Dow Corning Corporation. Dow Corning Corporation is 50% owned by publicly held Corning, Inc. and 50% owned by Dow Holdings, Inc., a wholly owned subsidiary of the publicly held Dow Chemical Company.

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STATEMENT OF THE CASE

A. Nature of the Case

This action arises out of the Chapter 11 Bankruptcy filed by Dow Corning Corporation ("Dow Corning") and from the breast implant mass tort which precipitated its filing. Petitioner Lou Anne Lavender Perkins ("Perkins") is one of more than 100,000 women who filed Proofs of Claim in the bankruptcy case seeking compensation for personal injuries allegedly resulting from their use of silicone breast implants.

Dow Corning emerged from bankruptcy on June 1, 2004 when its Amended Joint Plan of Reorganization ("the Plan") became effective. The centerpiece of the Plan is a breast implant settlement program which offers a variety of fixed monetary benefits to claimants without the necessity of proving many of the required elements of a product liability action such as a product defect or a causal connection between use of the product and a medical condition. The Plan created an independent claims operation known as the Settlement Facility – Dow Corning Trust ("SFDCT") to administer the settlement. SFDCT is run by a claims administrator and, ultimately, overseen by the District Court. To those claimants who prefer to pursue their claims through traditional litigation, the Plan created another entity, DCC Litigation Facility, Inc. ("the Litigation Facility"), a wholly-owned subsidiary of reorganized Dow Corning, to be the defendant in suits brought

by such claimants who formally indicate their intention of doing so by filing a "Participation Form" with SFDCT no later than 180 days from the Plan effective date or November 29, 2004. Perkins failed to file a Participation Form by that deadline, or at all, and brought the present lawsuit seeking leave to bring suit against the Litigation Facility notwithstanding her failure to satisfy that prerequisite under the clear provisions of the Plan.

In an opinion filed on March 31, 2007, the District Court found that, well in advance of the opt-out deadline, SFDCT had mailed the required participation form packet both to Perkins's attorney of record at that time and to Perkins herself at her last-known address. Both mailings came back as undeliverable. The District Court further found that Perkins and her initial counsel had a duty to update SFDCT with their current addresses and their failure to do so did not constitute excusable neglect which might justify an extension of the opt-out deadline. Accordingly, the District Court denied Perkins' motion for leave to bring suit against the Litigation Facility but leaving her free to pursue a claim under the settlement program.

Perkins appealed the District Court's ruling to the United States Court of Appeals for the Sixth Circuit which, in an opinion dated July 18, 2008, affirmed the District Court. On appeal to the Sixth Circuit, Petitioner argued, as she does in this Court, that the lower court erred in not allowing her the late opt-out from the Settlement Facility based on

excusable neglect. The Court of Appeals, however, agreed with the District Court finding no excusable neglect and concluded that the plain and ordinary meaning of the work "must," as set forth in the Plan, requires claimants to affirmatively elect to litigate and to complete and return the form by the election deadline which is a mandatory, and not a discretionary, requirement. (Writ Appendix A-2 through A-3.) The Sixth Circuit then stated that it agreed with the District Court and adopted its "well reasoned opinion and order," affirming the judgment of the District Court. (Writ Appendix A-3.)[1]

B. Statement of Facts

Before setting out the evidence in the record relevant to Petitioner's argument in her writ, it is necessary for respondent to observe that Petitioner's statement of the case contains misstatements and omissions as to the facts on the record before the lower courts. Also, Petitioner's argument in her writ contains unsubstantiated factual allegations that are simply wrong. For example, her claim that the opt-out deadline changed is untrue as the Plan itself set it 180 days from the effective date which never change. In addition, Petitioner's claims of the SFDCT

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[1] Because the District Court's Opinion was adopted as the opinion of the Sixth Circuit, but not included in the Petitioner's Appendix, Respondent has provided that opinion and order in its Appendix.

being in "disarray" and behind 50,000 claims in payment is simply unsubstantiated and untrue.

On June 9, 2006, Perkins filed "a Motion to File Notice of Intent to Opt-Out of the Settlement," and the District Court exercised its jurisdiction under the Plan to interpret and enforce the Plan's terms. Plan, Art. 8.7.3 and Art. 8.7.8. (R 1, Motion to File Notice of Intent; R 9, Order Denying Motion/Appeal to File Notice of Intent, pp. 4-5, APP pp. 4-5).[2]

Perkins claimed that she never received a form to opt-out of the settlement program nor any information regarding the deadline. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 1, APP p. 1). In her initial letter of appeal dated February 2, 2005, Petitioner stated that on September 10, 2003, she sent an e-mail to the "Dow Corning Tort Committee" which included her name, current address, telephone number and diagnosis. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 1, APP p. 1).[3] The email at issue was never sent to the

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[2] According to the Plan documents, *all* personal injury claimants who declined participation in the settlement program, except Class 8 claimants, were required to return to the Settlement Facility – Dow Corning Trust ("SFDCT") a completed participation form by November 29, 2004. Perkins is identified as a Class 5 claimant, meaning a domestic breast implant personal injury claim.

[3] Petitioner's reference to the "Dow Corning Tort Committee" is in reality the Official Committee of Tort Creditors which consisted of Plaintiffs' attorneys and is independent of both Dow Corning and SFDCT.

Settlement Facility, but to an address identified as "info@tortcomm.org." (R 9, Order Denying Motion/ Appeal to File Notice of Intent, p. 1, APP p. 1). Petitioner never contacted the SFDCT until 2005, well after the opt-out deadline. *Id.*

The claims administrator for the Settlement Facility, David Austern, in a 6/27/06 correspondence, stated that Perkins' original claim form packet was mailed in early 2003 to her attorney's last known address. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3). The packet, however, was returned "undeliverable" by the Postal Service. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3). On July 17, 2004, the Settlement Facility also mailed to Ms. Perkins's last known address a Class 5 Claim Packet and a Participation Form. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 7). Again, the packet was returned "undeliverable" in September 2004. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3).

In February 2005, Perkins called the Settlement Facility. At that time, she gave the Settlement Facility her new address but made no inquiries about opting out. (R 5, Response to Motion to File Notice of Intent, p. 2; R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3).

In June 2005, the Settlement Facility received notice that the law firm of Feldman, Franded, Woodard, Farris and Boudreaux was representing

Ms. Perkins. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3). On July 28, 2005, the Settlement Facility received another notice advising the Facility that the firm was no longer representing Ms. Perkins. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3).

On September 13, 2005, Ms. Perkins provided the Settlement Facility with yet another address which was different from the addresses noted on the District Court's correspondences to Ms. Perkins. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3.)

It is undisputed that Perkins has never filed a claim form with the Settlement Facility. (R 5, Response to Motion to File Notice of Intent, p. 2; R 9, Opinion and Order Denying Motion/Appeal to File Notice, pp. 3-4, APP pp. 3-4; and Petitioner's Sixth Circuit Appeal Brief, pp. 13, 15.)[4]

C. Litigation Background.

In Petitioner's initial letter of appeal of *February 18, 2005*, she wished to opt-out of the settlement program. The District Court exercised its jurisdiction

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[4] Perkins admitted that she had not filled out a Class 5 claim form and would not file a form maintaining that her attorneys advised her that she did not have to complete a Class 5 Claim packet to opt-out of the Settlement Facility. (R 7, Reply to Response to Letter to all Parties, pp. 1-2; and R 9, Order Denying Motion/Appeal to File Notice, p. 4, APP p. 4).

under the Plan to interpret and enforce the Plan's terms. (R 9, Opinion Denying Motion/Appeal, pp. 1, 4, APP pp. 1, 4). The basis of Perkins' claim was that she never received any form to opt-out of the settlement program, nor any information regarding the deadline. Essentially, Ms. Perkins was claiming excusable neglect because of her reliance on her attorneys, and that she had demonstrated her intent to opt-out of the settlement program based on various correspondence dated February 24, 2005, March 24, 2005, July 22, 2005, and July 28, 2005 (all past the participation form filing deadline of November 29, 2004), which chronicled her history of why she did not file a participation form. (R 9, Order Denying Motion to Appeal, p. 2, APP p. 2).[5]

In response to Ms. Perkins' motion to opt-out, the Litigation Facility noted that plaintiff admitted that she had never filed any participation form, much less a participation form on or before November 29, 2004. Therefore, she could not pursue an action against the Litigation Facility. (R 5, Response to Motion to File Notice of Intent, p. 2).

On March 31, 2007, the District Court, by the Honorable Denise Page Hood, issued a memorandum

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[5] Perkins acknowledged in the Sixth Circuit that she "may have taken some missteps in her attempts to protect her rights, [but] there can be no question that she manifested her election to litigate against the Litigation Facility and at no time demonstrated any inclination to accept the Settlement Facility resolution." (Petitioner's Sixth Circuit Appeal Brief, pp. 10-11.)

opinion and order denying Petitioner's Motion/Appeal to File Notice of Intent to Opt-Out. The Court found that excusable neglect was absent:

> However, as to Ms. Perkins failure to submit a timely Participation Form in order to properly opt-out from the Settlement Facility, the failure of Ms. Perkins or her initial counsel to verify the requirements of the Plan and the Plan Documents regarding the forms to submit and the deadline to submit the forms and the failure to update the Settlement Facility of Ms. Perkins and her initial counsel's addresses cannot constitute excusable neglect. The Settlement Facility mailed the forms to the addresses available to the Facility. *Ms. Perkins and her initial counsel had the duty to update the Settlement Facility with their current addresses.* [Italics added.] Ms. Perkins had the knowledge on September 10, 2003 to request information from the then-Tort Claimants Committee, after receiving the information from the Alexander Law Firm. It was not until February 2005, over a year later, that Ms. Perkins decided to contact the Settlement Facility. Ms. Perkins does not indicate how she learned of the Settlement Facility's telephone number. Based on Ms. Perkins letters, she had the opportunity to speak to various attorneys regarding her claim, including hiring a lawyer in June 2005. Ms. Perkins refers to the Alexander Law Firm in September 2003, Mr. Boudreaux in June 2005, Ms. Read in 2005 and Ms. Johnston of Toxic Discovery. There

> is no indication that Ms. Perkins or her initial counsel relied on misinformation provided by the Debtor or the Bankruptcy Court or the Settlement Facility prior to the November 29, 2004 Election Deadline. Although Ms. Perkins never received the Participation Form, it was not because she was intentionally deprived of receiving the Form. The Settlement Facility's records indicate the Packet was sent to her attorney of record and to Ms. Perkins herself but both were returned undeliverable. The Settlement Facility was not provided with the current addresses of both Ms. Perkins and her attorney of record See, e.g., *In re Isaacman*, 26 F.3d 629,636 (6th Cir. 1994); *In re Halstead*, 158 B.R. 485,487 (9th Cir. B.A.P. 1993), aff'd, 53 F.3d 253 (9th Cir. 1995). Unless the action of the moving party has been delayed by an outside force, there will generally be no cause to apply equitable tolling principles. *In the Matter of Hambright*, 216 B.R. 781, 783 (W.D. Mich. 1997). Ms. Perkins Claim must remain in the Settlement Program. However, Ms. Perkins must submit the appropriate forms to the Settlement Facility in order for her Claim to be processed. Ms. Perkins may refer to the Settlement Facility's website (www.sfdct.com) for further information and deadlines governing her Class 5 Claim.

(R 9, Opinion, pp. 8-9, APP pp. 8-9).

On April 19, 2007, the memorandum opinion and order was sent to Ms. Perkins. On May 1, 2007, Perkins filed a motion for reconsideration of the March 31, 2007, order. (R 10, Certificate of Service of Order and R 12, Motion for Reconsideration).

On May 1, 2007, plaintiff also filed her notice of appeal to the Sixth Circuit. (R 13, Notice of Appeal, pp. 1-6).

On May 3, 2007, plaintiff filed a second motion for reconsideration of the March 31, 2007, Order. (R 15, Motion for Reconsideration, pp. 1-2).

On February 28, 2008, the District Court denied both motions for reconsideration because Perkins demonstrated no palpable defect by which the Court and parties were misled nor had she shown that a different disposition of the case should result from the correction of any error. (See Writ Appendix, A-4 through A-6.)

After full briefing and oral argument, the Sixth Circuit Court of Appeals issued its opinion on July 18, 2008, affirming the judgment of the District Court and adopting its "well-reasoned opinion and order." (See Writ Appendix, A-1 through A-3.)

REASONS FOR DENYING THE PETITION

I. Where Petitioner Never Filed the Court-mandated Participation Form to Opt-Out of the Settlement Facility in Reference to Her Breast Implant Claim by the Filing Deadline of November 29, 2004, and Where Plaintiff Acknowledged in the Sixth Circuit "Misguided Actions" on Her Part in Regard to Her Failure to Opt-Out Primarily Involving Her Claimed Reliance on Her Attorneys, the Sixth Circuit Correctly Affirmed the Judgment of the District Court Denying Petitioner's Untimely Request to Opt-Out Where the Trial Court Exercised Proper Discretion in Denying Petitioner's Motion to Opt-Out Finding That She Showed No Excusable Neglect.

A. Petitioner Fails to Present Any Conflict in the Trial Court Decision or the Decision of the Court of Appeals and Has Not Met Her Burden of Demonstrating Compelling Reasons for the Petition to Be Granted.

Petitioner argues the Sixth Circuit "erred by affirming the entry of judgment denying Perkins's motion to opt-out of the Settlement Facility after the opt-out deadline had lapsed" maintaining that the 6th Circuit judgment "ignores the excusable neglect resulting in Perkins' failure to timely opt-out." Writ, pp. i and 5.

Petitioner's argument fails for the very reason that the Sixth Circuit, in adopting the District Court's opinion, found there was no excusable neglect on the part of Petitioner in failing to timely opt-out. As explicitly stated in the District Court opinion, "[A]s to Ms. Perkins' failure to submit a timely participation form in order to properly opt-out from the Settlement Facility, the failure of Ms. Perkins or her initial counsel to verify the requirements of the plan and the plan documents regarding the forms to submit and the deadline to submit the forms and the failure to update the Settlement Facility of Ms. Perkins and her initial counsel's addresses cannot constitute excusable neglect." (R 9, Order Denying Motion/Appeal to File Notice of Intent to Opt-Out, p. 6, APP p. 6).

In her attempt to deflect the court's attention from the finding of no excusable neglect, Petitioner falsely states that she was told by the SFDCT that it was in total disarray, was 50,000 claims behind, had not paid claims in two years, and its current administrator was being forced to step down. (See Writ, p. 2.) In truth, Petitioner attributed such unsubstantiated claims to third parties, not the SFDCT, as set forth in her correspondence to the trial court (correspondence which was treated as Perkins' motion to opt-out).

Setting aside the fact the SFDCT never made such statements and to the extent they are claimed, they are unsubstantiated, and Petitioner never argued the alleged "disarray" as a basis for a finding of "excusable neglect."

Further, Petitioner claims the Settlement Facility did not have her correct address until after the November 29, 2004, deadline to opt-out. Petitioner fails to acknowledge, however, that it was the responsibility of the Petitioner, not the Settlement Facility, to provide correct addresses in regard to further proceedings in the Settlement Facility.

Petitioner also claims that the writ should be granted because she did not receive the required forms and documentation prior to the deadline to opt-out of a class and that it was totally beyond Perkins' knowledge that the Settlement Facility was in "total disarray." Nonetheless, that is not what the record below reflects. Rather, the record reflects that it was the Petitioner who had the responsibility to update the Facility and who failed to provide the correct address to the Facility. Moreover, as Petitioner claims in her other reason for granting the writ, it was her attorneys "failure to update her address" which Petitioner "is now being held accountable for." Under these circumstances, plaintiff's own "reasons for granting the writ" actually compel that the Writ be denied.

In any event, the Sixth Circuit affirmance of the District Court's decision is correct because the District Court did not exercise an abuse of discretion in denying the untimely request to opt-out.[6]

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[6] Under these circumstances, denial of a late claim is reviewed on an abuse of discretion standard. *Burns v. Elrod*, 752 F.2d 151, 154 (7th Cir. 1985). An abuse of discretion is present

(Continued on following page)

While Petitioner claims that failure to file the participation opt-out form constitutes "excusable neglect," she fails to discuss the applicable test for excusable neglect and whether it applies under the circumstances of this matter. After reviewing the test and applying it to this case, it is evident that the District Court exercised proper discretion in denying plaintiff's motion to opt-out of the Settlement Facility.

The Plan and its opt-out deadline date to litigate claims against the Litigation Facility arose out of a bankruptcy reorganization of Dow Corning Corporation.[7]

Bankruptcy Rule 9006(b)(1) permits a court to allow claims filed after a court ordered bar date if the failure to timely file was the result of "excusable neglect." The "burden of proving excusable neglect lies with the late-claimant." *In re Enron Corp.*, 419

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only if the appellate court has a definite and firm conviction that the District Court committed a clear error of judgment. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1988).

[7] As the bankruptcy court-imposed deadline for filing participation opt-out forms was November 29, 2004, FRCP 60(b) provides that excusable neglect will relieve a party from a judgment but such a motion based on excusable neglect must be filed within a year from the date of the judgment. In this matter, the deadline for filing was November 29, 2004, but Petitioner still has not filed a participation form to opt-out of Settlement Facility. Moreover, Petitioner did not file her motion to file notice of intent to opt-out until June 9, 2006. (R 1, Motion to File Notice of Intent by Plaintiff.)

F.3d 115, 121 (2d Cir. 2005); *Jones v. Chemetron Corp.*, 212 F.3d 199, 205 (3rd Cir. 2000); and *Pelican Product Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990).

In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 1123 L.Ed.2d 74 (1993), this Court examined the definitions of excusable neglect in Federal Rule of Civil Procedure 60(b) as guideposts, since it found that Bankrupty Rule 9006(b)(1) was "patterned after Rule 60(b)" of the Federal Rules. *Pioneer*, 507 U.S. at 391, 113 S.Ct. at 1496. This Court found that the inquiry into whether the neglect is excusable "is at bottom an equitable one, taking account of all the relevant circumstances surrounding the party's omission." *Id.* at 395, 113 S.Ct. at 1498. This Court then listed several factors to be considered in the equitable inquiry, including "(1) the danger of prejudice to the debtor; (2) length of the delay and its potential impact on the proceedings; (3) the reason for the delay; (4) whether the delay was within the reasonable control of the late party; and (5) whether the late party acted in good faith." *In re Eagle-Picher Indus., Inc.*, 131 F.3d 1185, 1188 (6th Cir. 1997).

The factors of the *Pioneer* test "do not carry equal weight; the excuse given for the late filing must have the greatest import." *Graphic Commc'ns Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001) (quotation omitted); accord *In re Enron Corp.*, 419 F.3d 115, 122-23 (2d Cir. 2005); *In re Am. Classic Voyages Co.*, 405 F.3d 127, 134 (3d Cir. 2005)

("We rely primarily on the third *Pioneer* factor," the reason for the delay); *In re Kmart Corp.*, 381 F.3d 709, 714-15 (7th Cir. 2004).

Courts have found that if the late claimant's reason for delay is insufficient, excusable neglect will not be found even if the other factors favor the claimant. *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 228 (2d Cir. 2004) (absent sufficient reason for delay, minimal delay and prejudice will not constitute excusable neglect); *US v. Torres*, 372 F.3d 1159, 1162-63 (10th Cir. 2004) (no excusable neglect when reason for delay was confusion over deadline, even though all other *Pioneer* factors favored claimant); *Hosp. del Maestro v. Nat'l Labor Relations Bd.*, 263 F.3d 173, 175 (1st Cir. 2001) (unjustified failure to comply with plain, unambiguous deadline in notice is not excusable neglect despite only 1-day delay, little danger of prejudice, no negative impact on proceedings, and claimant's good faith); *In re Eagle-Picher Indus., Inc.*, 158 B.R. 713, 716 (Bankr. S.D. Ohio 1993) (lack of valid excuse and ample notice of bar date outweigh absence of prejudice or adverse effect on administration).

Petitioner's newest reason for excusable neglect, raised for the first time in her Writ, is that claimants were categorized "differently" and the opt-out deadline "has undergone a number of revisions and changes." (Writ, p. 5.) As for the later excuse, there is no evidence in the record substantiating this new allegation. Concerning the former excuse, Petitioner never argued that the different categories of claimants somehow constitutes a reason for excusable

neglect. Nor does Petitioner articulate how the different categories of claimants resulted in her being unable to file a timely opt-out form.

Petitioner, however, misperceives the nature of what constitutes excusable neglect. Besides, the prejudice that would be visited on the Litigation Facility if such an untimely claim (and more to the point, one where no participation form was ever filed) were allowed to proceed would be substantial.

First, Petitioner cites no case in support of her argument that consulting with various counsel and her "conduct" constitutes excusable neglect. (Petitioner, Writ, p. 5.) In fact, the contrary is true. Reliance on the advice of counsel, even if that was the reason for Perkins not filing the participation form, is not evidence of excusable neglect. Perkins is responsible for her choice of counsel, and her choice to follow counsel's advice. This Court has noted that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co.,* 507 U.S. at 396, 113 S.Ct. at 1496. The Sixth Circuit observed that it may be excusable for a client to rely on the advice of counsel, but failure to verify the requirements of the law demonstrates attorney malpractice, not excusable neglect. *McCurry v. Adventist Health Sys./Sunbelt, Inc.,* 298 F.3d 586, 595 (6th Cir. 2002).

To the extent that Petitioner is claiming that she was proceeding without representation at various points, this is insufficient to constitute excusable neglect.

Perkins's failure to read or comprehend the Plan does not support a finding of excusable neglect, even if she was unrepresented. See *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested procedural rules . . . should be interpreted so as to excuse mistakes by those who proceed without counsel."), cited in *In re G.A.D., Inc.*, 340 F.3d 331, 335 (6th Cir. 2003) and *Nicholson v. City of Warren*, 467 F.3d 525, 527 (6th Cir. 2006). Perkins' wish to opt-out after the deadline is not transformed into excusable neglect simply because she chose not to have counsel fill out her participation form.

Accordingly, under the *Pioneer* factors, the reason for delay, Factor No. 3, and whether Perkins's omission was within her reasonable control, Factor No. 4, do not support excusable neglect. Given that the excuse itself for not filing the Participation Form is generally considered to have the greatest import, Perkins fails to meet this overriding requirement under the *Pioneer* factors.

Regarding Petitioner's claim that there is no danger of prejudice to the Respondent for allowance of Perkins' late claim, this would open the floodgates to the Litigation Facility if all other similarity situated claimants like the Petitioner were allowed to proceed.

First, the party seeking to file a late claim carries the burden of proving the lack of prejudice to the debtor. *In re Cable and Wireless, USA, Inc.*, 338 B.R. 609, 614 (Bankr. D. Del. 2006). Petitioner has failed

to carry her burden of proving a lack of prejudice to the Litigation Facility.

Courts consistently find impermissible prejudice when the allowance of one late claim would "open the floodgates" to other similar late claims. *Am. Classic Voyages*, 405 F.3d at 133-34 (due to large volume of late claim requests filed and continuing inquiries from other late claimants, allowing one late claim could render bar date meaningless); *Kmart*, 381 F.3d at 713-14 (allowing relatively small late claim could induce other late claimants to seek admission based on a "simple 'innocent mistake'" and open the door to "a mountain of such claims with a corresponding price tag in the millions of dollars"); *In re Spiegel, Inc.*, 337 B.R. 816, 820 (Bankr. S.D.N.Y. 2006) ("To allow claims filed by parties at the late date of confirmation would wreak havoc with the entire Plan negotiation process. Allowing the Amended Claims could also adversely affect the estate by opening the floodgates to similar claims in a case where over 4,300 claims have been filed."); *In re Agway, Inc.*, 313 B.R. 31, 45 (Bankr. N.D.N.Y. 2004) (allowing late claims "would open the door to other late claimants in the case, which would . . . prejudice the debtors by requiring them to expend time and counsel fees objecting to these motions").

As in *Enron*, the Settlement Facility involves thousands of potential late claimants. Perkins is not "only one" late-filed claim – the allowance of her to file late claim will serve as a green light to a flood of other potential litigants seeking to opt-out after the

deadline. See *Enron*, 419 F.3d at 130 (quoting *Kmart*, 381 F.3d at 714) (finding the "more relevant inquiry is whether allowing one such claim would lead to 'a mountain of such claims, . . . which the bankruptcy court, having admitted the first claim, would be hard pressed to reject.'") *In re A.H. Robins Co., Inc.*, 219 B.R. 153, 158 (E.D. Va. 1998), aff'd, 164 F.3d 623 (1998) ("allowing any of the over 106,000 disallowed claimants to revive a claim upon the mere assertion of compliance with the deadline or nonreceipt of the necessary forms would have so diluted the excusable neglect requirement in 1989 to 1991 as to open the floodgates to additional claims to payment from the limited Trust fund. The prejudice to the Trust and to each of the 200,000 claimants who had complied with all the deadlines to perfect their claims would have been considerable then as well.").

Significantly, the complete lack of specificity and ever-changing excuses in Perkins' claims for her untimely opt-out means that if the Court granted Perkins motion, it would have no reason to refuse any other untimely opt-out.

Therefore, the first *Pioneer* factor also favors the Litigation Facility.

Finally, Petitioner now argues that she was denied "procedural due process . . . contrary to fundamental notions of fairness. See *Mulane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)." Writ, p. 6. Petitioner, however, fails to articulate exactly what procedural due process was denied. The fact that she

was barred from opting out of the Settlement Facility because she failed to timely opt-out is not a denial of procedural due process as reflected in the various cases cited in this brief declining to allow a late claim. In fact, the *Mulane* decision cited by Petitioner actually supports the lower courts' decisions. *Mulane* held that in an action similar to this, actual notice is not required by due process. *Mulane* involved a judicial settlement of accounts by the trustee of a common trust fund established under New York banking law involving statutory notice by newspaper publication to beneficiaries of the trust. In addressing the issue of due process, this Court stated:

> [A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314, 70 S.Ct. at 657 (italics added). This language certainly implies that actual receipt of notice is not required by due process, as long as the notice sent was "reasonably certain to inform those affected or where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Id.* at 315, 70 S.Ct. at 658; *Schroeder v. City of New York*, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), where the Court noted that the defendant city was "constitutionally obliged to make at least a good faith effort to give personally to the

appellant [notice of the right to be heard] – an obligation which the mailing of a single letter would have discharged." *Id.* at 83 S.Ct. 283.

In sum, given the application of the most important *Pioneer* factors to this matter, the District Court exercised proper discretion in denying Petitioner's motion to opt-out of the Settlement Facility and the Sixth Circuit correctly affirmed the judgment.

Petitioner, therefore, has not met her burden pursuant to Sup. Ct. R. 10 demonstrating any "compelling reasons" for the petition to be granted by this Court.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

DATED:
January 16, 2009

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

DOW CORNING CORPORATION,

Reorganized Debtor.

Lou Anne Lavender Perkins,

v.

DCC Litigation Facility Incorporated. /

Civil Action No. 06-CV-12558-DT
Honorable Denise Page Hood

MEMORANDUM OPINION AND ORDER

(Filed Mar. 31, 2007)

I. BACKGROUND

This matter is before the Court on Lou Anne Lavender Perkins' Letters/Appeal to Opt-Out from the Settlement Facility-Dow Corning Trust ("Settlement Facility"). Ms. Perkins claims she never received a form to opt out of the Settlement Program nor any information regarding the deadline.

In her initial letter of appeal dated February 18, 2005, Ms. Perkins indicated that on September 10, 2003, she sent an e-mail to the Settlement Facility which included her name, current address, telephone number and diagnosis. (2/18/05 Letter/Appeal) However, a review of the e-mail indicates that the e-mail

was sent to the then-Tort Claimants' Committee e-mail address at "info@tortcomm.org." (Ex to 2/18/05 Letter/Appeal) On February 4, 2005, Ms. Perkins spoke with Annie O'Brien from the Settlement Facility who indicated that the Facility did not have information as to whether Ms. Perkins opted-out of or opted-in to the Settlement Program and that information from her counsel was returned in February 2003. Ms. Perkins indicated to Ms. O'Brien that she had updated her information in September 2003 but was told by Ms. O'Brien that they did not accept e-mails. Ms. Perkins indicated to Ms. O'Brien that the e-mail did not come back to her as undelivered and that Kathy Johnson with Toxic Discovery sends the Settlement Facility e-mails all the time. Ms. O'Brien referred Ms. Perkins to the Multi District Litigation Facility ("MDL").

Ms. Perkins thereafter called the MDL and spoke with Sandra Townsend who told her that her records had been sent to the Settlement Facility two years earlier. Ms. Townsend was able to confirm Ms. Perkins' catalog and lot numbers to her Dow Corning implants. Ms. Townsend advised Ms. Perkins to call the Settlement Facility again.

Ms. Perkins called the Settlement Facility again and this time spoke to John who confirmed her SID number, her Class 5 Claimant status and an incorrect address. John told Ms. Perkins that if she wanted to change her address or attorney on the record, she had to do so in writing. Ms. Perkins told John that she wanted to op-out but he told her the deadline was

November 29, 2004. John indicated to Ms. Perkins that if she wanted to opt-out, Ms. Perkins had to write a letter before February 28, 2005 and to send the letter to the Court address. Ms. Perkins received a Claimant Information Update Request form from John. She indicated she had filled out the form and was mailing the form back to the Settlement Facility. Ms. Perkins also prepared a letter requesting a Class 5 Claim packet to send to the Settlement Facility. Ms. Perkins requests that she be allowed to opt-out of the Settlement Facility. (2/18/05 Letter/Appeal)

Ms. Perkins' subsequent letters to the Court dated February 24, 2005, March 17, 2005, March 24, 2005, July 22, 2005 and July 28, 2005, indicate that she wishes to opt-out from the Settlement Facility. Ms. Perkins engaged Paul Boudreaux's services as counsel on May 14, 2005. Mr. Boudreaux apparently filed a lawsuit on behalf of Ms. Perkins lawsuit against Dow Corning, Dow Chemical, Corning Corporation and Dr. Frederick Martin in Tulsa County District Court, State of Oklahoma. (7/22/05, 7/28/05 and 9/13/05 Letters) Ms. Perkins in her letters indicated that Dow Corning's lawyers threatened to seek sanctions against Ms. Perkins and her then-counsel, Paul Boudreaux, for filing the lawsuit. In June 2005, Mr. Boudreaux submitted an Order dismissing the lawsuit. (Ex. to 7/28/05 Letter) Mr. Boudreaux withdrew from representing Ms. Perkins in the lawsuit and from the matters before the Settlement Facility. (Ex. to 9/13/05 Letter)

David Austern, Claims Administrator for the Settlement Facility, submitted a letter on June 27, 2006 indicating that Ms. Perkins did not timely file an Opt-Out Form. (6/27/06 Austern Letter) Mr. Austern indicated that Ms. Perkins' original Claim Form Packet was mailed in early 2003 to her attorneys' last known address. The Packet was returned "undeliverable" by the United States Postal Service. On July 17, 2004, the Settlement Facility mailed to Ms. Perkins, at her last known address, a Class 5 Claim Packet and a Participation Form. The Packet was returned undeliverable in September 2004. Ms. Perkins thereafter called the Settlement Facility in February 2005 wherein she gave the Facility her new address. Later in June 2005, the Settlement Facility received a notice that the law firm of Feldman, Franded, Woodard, Farris and Boudreaux was representing Ms. Perkins. On July 28, 2005, the Settlement Facility received another notice advising the Facility that the firm was no longer representing Ms. Perkins. On September 13, 2005, Ms. Perkins provided the Settlement Facility with another address. Mr. Austern indicates that Ms. Perkins' current address in their records is different from the addresses noted on the Court's correspondences to Ms. Perkins. Mr. Austern indicates that, to date, Ms. Perkins has not filed a Claim Form with the Settlement Facility. (6/27/06 Letter)

The Litigation Facility, in response to Ms. Perkins' requests to opt-out, argues that because Ms. Perkins failed to complete a Participation Form, to

date, she is precluded from opting out of the Settlement Facility since the November 29, 2004 deadline is passed. The Packet was mailed to Ms. Perkins' last known address and her attorney's last known address. The Litigation Facility argues that she and her counsel had an obligation to keep the Settlement Facility apprised of her current address. Ms. Perkins did not contact the Settlement Facility until February 2005, which was after the November 29, 2004 deadline. The Litigation Facility claims that Ms. Perkins' request to opt-out should be denied.

In reply to Ms. Austern's letter and the Litigation Facility's response, Ms. Perkins admits that she has not filled out a Class 5 Claim Form and will not file the form. (7/13/06 Reply) She indicated that Karen Read, "Chair of the Dow Litigation Attorney", and Kathy Johnston, from Toxic Discovery, both told her not to fill out her Class 5 Claim Packet because Ms. Perkins was opting out and not staying in the Settlement Facility. Ms. Perkins seeks to opt-out from the Settlement Facility.

II. ANALYSIS

A. Plan Interpretation

The Court retains jurisdiction under the Amended Joint Plan of Reorganization ("Plan") "to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents" and "to allow, disallow, estimate, liquidate or determine any Claim, including Claims of

a Non-Settling Personal Injury Claimant, against the Debtor and to enter or enforce any order requiring the filing of any such Claim before a particular date." (Plan, Art. 8.7.3 and Art. 8.7.8)

The Plan provides that each Personal Injury Claimant shall be afforded the option, "during the six-month period following the Effective Date, to elect to settle or to opt out of the settlement options under the Settlement Facility." (Plan, Art. 5.4) The Participation Form gives a Personal Injury Claimant the opportunity to elect to settle or litigate their Claims under the terms of the Settlement Facility Agreement or the Litigation Facility Agreement, as applicable. (Plan, Art. 1.123) The Settlement Fund and Distribution Agreement, Annex A, provides that Claimants have a right to elect to pursue litigation against the Litigation Facility instead of participating in the Settlement Program but "must affirmatively elect to litigate." (SFA, Annex A, Art. 3.02(a)) Personal Injury Claimants "must make their election by completing, signing and returning the Participation Form to the Claims Office on or before the six (6)-month anniversary of the Effective Date ("Election Deadline")." (SFA, Annex A, Art. 3.02(c)(i)) "Claimants who elect litigation must sign the Participation Form." (SFA, Annex A, Art. 3.02(c)(v)) "A Claimant whose Participation Form is rejected because it was not submitted by the Election Deadline may appeal to the Appeals Judge." (SFA, Annex A, Art. 3.02(c)) Because this matter has been brought to the Court's attention by the Claimant, the Court exercises its jurisdiction

under the Plan to interpret and enforce the Plan terms. (Plan, Art. 8.7.3 and Art. 8.7.8)

"In interpreting a confirmed plan courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors." *In re Dow Corning Corporation,* 456 F.3d 668, 676 (6th Cir. 2006); 11 U.S.C. § 1141(a). "State law governs those interpretations, and under long-settled contract law principles, if a plan term is unambiguous, it is to be enforced as written, regardless of whether it is in line with parties' prior obligations." *Id.* "A term is deemed ambiguous when it is 'capable of more than one reasonable interpretation.'" *Id.* (citation omitted). The word "must" means that the requirement is mandatory and not discretionary. *Perotta v. Gregory,* 4 Misc.2d 769, 771, 158 N.Y.S.2d 221, 223 (N.Y. Sup. 1957); *Lazar v. Towne House Rest. Corp.*, 6 N.Y.S.2d 923, 924, 190 N.Y.S.D. 997 (N.Y. 1959).

The plain and ordinary meaning of the word "must" as set forth in Annex A of the Plan requiring Claimants to affirmatively elect to litigate and to sign the Participation Form is unambiguous. As noted above, the word "must" means the requirement is mandatory and is not discretionary. Under Annex A of the Plan, the Participation Form must be completed, signed and returned by the Election Deadline. Ms. Perkins, the Settlement Facility and the Litigation Facility all agree that Ms. Perkins never submitted a Claim Form nor a Participation Form. Nothing in the Plan or the Plan Documents allows the Settlement Facility or the Litigation Facility to allow a Claimant,

who has not submitted a Participation Form at all, to elect to litigate against the Litigation Facility after the November 29, 2004 Election Deadline. Only the Plan Proponents may jointly amend or modify the Plan. (Plan, Art. 11.4) The Plan Proponents' successors have not agreed in this case to modify the Plan or Plan Documents language to allow a Claimant to opt-out of the Settlement Facility without submitting a Participation Form beyond the November 29, 2004 Election Deadline.

B. Excusable Neglect

The next issue is whether Ms. Perkins' or her former counsel's failure to update the Settlement Facility with each of their current addresses constitutes "excusable neglect." The Supreme Court in addressing a late claim filed beyond the deadline set forth in Bankr. R. 3003 used the "excusable neglect" standard under Fed. R. Civ. P. Rule 60(b)(1) to determine whether the Bankruptcy Court had the authority to enlarge time limitations under Bankr. R. 9006(b), which is patterned after Fed. R. Civ. P. 6(b). The Supreme Court approved the following factors that a court may consider in finding excusable neglect: 1) the danger of prejudice to the debtor; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the movant; and, 4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). However, the

Supreme Court disapproved the allowance of a late claim based on the omissions of an attorney. *Id.* at 396. The Supreme Court noted that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* at 396. A client, having chosen a particular attorney to represent him in a proceeding, cannot "avoid the consequences of the acts or omissions of this freely selected agent," and that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Id.* at 397. In assessing a claim of excusable neglect, "the proper focus is upon whether the neglect of [the parties] *and their counsel* was excusable." *Id.* (emphasis in original). In applying the Supreme Court's analysis, the Sixth Circuit has noted that it may be excusable for a client to rely on the advice of counsel, however, action or inaction by counsel that leads to successful malpractice suits by the injured client do not qualify as a mistake or excusable neglect under Rule 60(b)(1) and that failure to verify the requirements of the law demonstrates attorney malpractice, not excusable neglect. *McMurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 595 (6th Cir. 2002) (quotations and citations omitted).

In addressing the factors set forth by the Supreme Court, the Court finds that allowing this one claim to proceed against the Litigation Facility would not prejudice the Debtor. The Litigation Facility has

not provided any evidence that allowing Ms. Perkins' claim would affect the remaining funds to litigate claims against the Litigation Facility under the Plan. Allowing Ms. Perkins' claim will not further delay the administration of the Plan since the claims against the Litigation Facility are currently in the initial resolution, pre-discovery phase. Bad faith on behalf of Ms. Perkins has not been shown, given that it appears she and her initial counsel (when her claim was filed before the MDL) no longer communicated when the Claim Packets were mailed to them.

However, as to Ms. Perkins' failure to submit a timely Participation Form in order to properly opt-out from the Settlement Facility, the failure of Ms. Perkins or her initial counsel to verify the requirements of the Plan and the Plan Documents regarding the forms to submit and the deadline to submit the forms and the failure to update the Settlement Facility of Ms. Perkins and her initial counsel's addresses cannot constitute excusable neglect. The Settlement Facility mailed the forms to the addresses available to the Facility. Ms. Perkins and her initial counsel had the duty to update the Settlement Facility with their current addresses. Ms. Perkins had the knowledge on September 10, 2003 to request information from the then-Tort Claimants' Committee, after receiving the information from the Alexander Law Firm. It was not until February 2005, over a year later, that Ms. Perkins decided to contact the Settlement Facility. Ms. Perkins does not indicate how she learned of the Settlement Facility's telephone

number. Based on Ms. Perkins' letters, she had the opportunity to speak to various attorneys regarding her claim, including hiring a lawyer in June 2005. Ms. Perkins refers to the Alexander Law Firm in September 2003, Mr. Boudreaux in June 2005, Ms. Read in 2005 and Ms. Johnston of Toxic Discovery. There is no indication that Ms. Perkins or her initial counsel relied on misinformation provided by the Debtor or the Bankruptcy Court or the Settlement Facility prior to the November 29, 2004 Election Deadline. Although Ms. Perkins never received the Participation Form, it was not because she was intentionally deprived of receiving the Form. The Settlement Facility's records indicate the Packet was sent to her attorney of record and to Ms. Perkins herself but both were returned undeliverable. The Settlement Facility was not provided with the current addresses of both Ms. Perkins and her attorney of record. *See, e.g., In re Isaacman,* 26 F.3d 629, 636 (6th Cir.1994); *In re Halstead,* 158 B.R. 485, 487 (9th Cir. B.A.P. 1993), aff'd, 53 F.3d 253 (9th Cir.1995). Unless the action of the moving party has been delayed by an outside force, there will generally be no cause to apply equitable tolling principles. *In the Matter of Hambright,* 216 B.R. 781, 783 (W.D. Mich. 1997). Ms. Perkins' Claim must remain in the Settlement Program. However, Ms. Perkins must submit the appropriate forms to the Settlement Facility in order for her Claim to be processed. Ms. Perkins may refer to the Settlement Facility's website (www.sfdct.com) for further information and deadlines governing her Class 5 Claim.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Lou Anne Lavender Perkins' Motion/Appeal to File Notice of Intent **(Docket No. 1, filed June 9, 2006)** is DENIED and this matter is CLOSED.

IT IS FURTHER ORDERED that the Motion to Extend Deadline **(Docket No. 3, filed June 19, 2006)** is MOOT, Ms. Perkins having filed supplemental letters on June 26, 2006 and July 13, 2006.

S/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: March 31, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 31, 2007, by electronic and/or ordinary mail.

S/ William F. Lewis
Case Manager

No. 08-804

Supreme Court, U.S.
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In The Supreme Court of the United States

LOU ANNE LAVENDER PERKINS,
Petitioner,

v.

DCC LITIGATION FACILITY, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF

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REPLY

Pursuant to Sup. Ct. R. 15, Petitioner files this Reply to Respondent's Brief In Opposition as follows:

A. Respondent fails to address the "Question Presented."

Respondent's attempt to restate the question presented for this Court's review is improper under Sup. Ct. R. 14(1)(a). Respondent's "Question Presented" is argumentative and fails to comply with the rule's prescription that the question be short and presented without unnecessary detail. Regardless, Respondent's "Question Presented" is irrelevant as "only the questions set out in the petition, or fairly included therein, will be considered by the Court."

B. The potential impact of the Court's review is a compelling reason to grant the petition.

Respondent's Brief In Opposition demonstrates precisely why this Court should grant the petition. On one hand, Respondent contends that Petitioner has failed to identify compelling reasons for the granting of the petition, while at the same time Respondent acknowledges that review of the Sixth Circuit's decision would impact "thousands" of individuals. *See* Brief In Opposition at 19, 22. The undeniable fact that this Court's review of the Sixth Circuit's decision would impact the legal rights of such a large number of individuals is in itself a compelling reason to grant the petition.

C. Permitting Petitioner to opt out after the deadline would not create an exception that would swallow the rule.

Respondent's contention that "if the Court granted Perkins [sic] motion, it would have no reason to refuse any other untimely opt-out" fails to acknowledge the undisputed fact that Petition made good-faith efforts to comply with her obligation to keep the Settlement Facility informed of her current contact information. *See* Brief In Opposition at 20. Petitioner is only requesting that this Court grant the petition to determine whether an individual who has made good faith attempts to comply with his or her obligations under an opt-out plan, but who nevertheless has failed to receive notice of the opt-out deadline, should be permitted to opt out after the expiration of the deadline. By no means does the question presented constitute the exception that would swallow the rule.

D. The undisputed facts

The material facts are not in dispute. Respondent does not dispute that Petitioner did not receive notice of the opt-out deadline until after the deadline had passed. Respondent does not dispute that Petitioner sent her updated and current contact information via email to info@tortcomm.org prior to the opt-out deadline. Instead, Respondent contends that Petitioner's email to info@tortcomm.org was never sent to the Settlement Facility, and that therefore she failed to comply with her responsibility to provide correct addresses in regard to further proceedings in the Settlement Facility. *See* Brief In Opposition at 13. Notably, Respondent does not dispute that Petitioner would be permitted to opt out

after the deadline if she had provided her correct address to the Settlement Facility.

On September 10, 2003, over a year prior to the November 29, 2004 opt-out deadline, Petitioner sent an info@tortcomm.org updating her information, name, current address, diagnosis and requesting assistance and help. Respondent does not dispute Petitioner's contention that her understanding at the time was that the email would go to the Dow Corning Tort Committee, otherwise known as The Tort Claimants' Committee, a committee appointed to represent the interests of all tort claimants during the bankruptcy phase of the case against Dow Corning. The Tort Claimants' Committee ceased to function as an official committee when the Amended Joint Plan of Reorganization for Dow Corning Corporation became effective on June 1, 2004. On June 1, 2004, the Amended Joint Plan of Reorganization (the "The Plan") became effective and created a court-appointed committee named the Claimants' Advisory Committee, which was appointed to represent the general interests of all tort claimants in the settlement. Significantly, Claimant's Advisory Committee used the very same email address as the Tort Claimants' Committee, info@tortcomm.org. Notably, this same email address still appears on the website of the Claimants' Advisory Committee today, the very same way as it did when the committee was the Tort Claimants' Committee. *See* <http://www.tortcomm.org/>.

Statements on the Claimants' Advisory Committee website include the following:

- "The Tort Claimants' Committee ceased to function as an official committee when the Plan of Reorganization for Dow Corning corporation became effective on June 1, 2004. The Plan Documents provide that a new committee – called the Claimants' Advisory Committee or CAC – will be appointed to represent the general interests of tort claimants. The United States District Court issued an Order and Notice of Appointment of the Claimants' Advisory Committee on May 20, 2004. The CAC will continue to maintain this website and provide information to tort claimants and counsel."

- "All inquiries to the Claimants' Advisory Committee should be directed to the following email address: info@tortcomm.org".

- "Under 'Latest News' - Welcome to the new Claimants' Advisory Committee (CAC) website! We have redesigned the former Tort Claimants' Committee website to provide you with current information concerning the settlement and litigation options in the Settlement Facility-Dow Corning Trust (SF-DCT).

- "If you need legal assistance with your claim, you can contact the Claimants'

Advisory Committee at info@tortcomm.org."

- Inquiries about the Settlement Option and Litigation Option may be directed to the Claimants' Advisory Committee at: info@tortcomm.org.

E. The Sixth Circuit failed to apply this Court's test for excusable neglect.

This Court has stated that the determination of whether a party's neglect of a deadline is excusable is an equitable one, taking account of all relevant circumstances surrounding the party's lapse. *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489 (1993). "These include ... the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.*

Respondent relies entirely on the "floodgates" argument to show putative prejudice resulting from Petitioner's being permitted to opt-out of the settlement after the deadline. *See* Brief In Opposition at 18. However, as outlined above, the significance of Petitioner's question presented would extend only to those individuals like Petitioner whose failure to timely opt out is the result of excusable neglect.

Moreover, Respondent does not dispute that Petitioner was diligent in moving to opt-out after

discovering that the deadline to do so had passed. Respondent does not even contend that the length of the delay and its potential impact on judicial proceedings weighs against Petitioner's excusable neglect. Instead, Respondent acknowledges that the third factor—the reason for the delay—is the most important factor and then proceeds to mischaracterize the reason for Petitioner's delay in opting out. To clarify, Petitioner does not contend that her reliance on the counsel of her attorneys caused her to fail to timely opt-out. Again, the undisputed fact that Petitioner did not receive notice of the opt-out deadline was the reason for her delay, and the reason she did not receive the notice was that the Settlement Facility did not send it to her correct address despite Petitioner's undisputed good-faith attempts to update her information. Also, the delay was not within Petitioner's reasonable control because she had sent her updated information to the entity she understood to be responsible for maintain records.

As expected, Respondent completely ignores the good faith factor of *Pioneer*, obviously because it weighs in favor in excusable neglect.

Combined with Petitioner's clear and consistent manifestations of her intent to litigate her claims outside of the class, Petitioner's good faith attempts to comply with her responsibility to provide correct addresses in regard to further proceedings in the Settlement Facility demonstrate the Sixth Circuit's error in affirming the District Court's judgment.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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